

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Implementation of the |) | CC Docket No. 96-115 |
| Telecommunications Act of 1996 |) | |
| |) | |
| Telecommunications Carriers' Use |) | |
| of Customer Proprietary Network |) | |
| Information and Other Customer Information; |) | |
| |) | |
| Implementation of the Non-Accounting |) | CC Docket No. 96-149 |
| Safeguards of Sections 271 and 272 of the |) | |
| Communications Act of 1934, As Amended |) | |
| |) | |

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its comments on the Federal Communications Commission's ("Commission") Second Further Notice of Proposed Rulemaking to implement Section 222 of the Communications Act of 1934, governing carrier use and disclosure of customer proprietary network information ("CPNI").¹

I. INTRODUCTION AND SUMMARY

The Commission issued the *CPNI Second FNPRM* in the wake of the decision of the United States Court of Appeals for the Tenth Circuit² vacating the Commission's requirement that a carrier must obtain its customer's "opt-in" consent before using CPNI to market services

¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-115 and 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (rel. Sept. 7, 2001) ("*CPNI Second FNPRM*").

² *US West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000) ("*US West v. FCC*").

outside the customer's existing service relationship with that carrier.³ The Court held that the First Amendment does not allow the imposition of an opt-in requirement in the absence of actual evidence that a less restrictive alternative, such as an opt-out strategy for obtaining customer consent, would be insufficient to protect CPNI.⁴ Application of the Tenth Circuit's First Amendment analysis supports the Commission's adoption of a notice and opt-out approach to ensure informed customer consent to carriers' use and disclosure of CPNI under Section 222.

A notification and opt-out regulatory framework maximizes the customer's knowledge and control over his or her CPNI. The Commission's existing notification requirement, 47 C.F.R. § 64.2007(f), already ensures informed decision-making by consumers. In addition, regulations crafted by the Federal Trade Commission ("FTC") to provide consumers with a reasonable opportunity and means to opt-out from financial institutions' disclosure of their highly sensitive personal financial information under the Gramm-Leach-Bliley Act provide a useful model for the Commission's CPNI rules.

While a notice and opt-out approach would allow more efficient customer control and carrier use of CPNI, Bell Operating Companies' ("BOCs") sharing of CPNI with their affiliates under this approach, without further requirements, would run afoul of the Section 272 prohibition on BOCs' discrimination between their affiliates and other entities in the provision of information. Allowing BOCs to share CPNI with their affiliates through an opt-out mechanism to market new services, while requiring that the customer submit an affirmative written request before such information may be disclosed to the BOCs' competitors under Section 222(c), would

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Order and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 8061 (1998) ("CPNI Order").

⁴ *US West v. FCC*, 132 F.3d at 1239.

enable BOCs to use their large customer base and store of CPNI to provide an exclusive competitive advantage to their affiliates. Consequently, the Commission should adopt, as part of a notice and opt-out approach, a prohibition on BOCs' sharing of CPNI with any Section 272 affiliate, outside of the total service relationship,⁵ unless the affiliate has obtained affirmative customer consent in the same manner as unaffiliated entities under Section 222(c).

II. A NOTICE AND OPT-OUT APPROACH TO CUSTOMER CONSENT

Analyzing the CPNI rules in light of carriers' First Amendment rights, the Tenth Circuit stated that the Court "assume[d] for the sake of this appeal that the government has asserted a substantial state interest" in protecting customer rights to control their CPNI.⁶ In contrast, the Court was "not satisfied that the interest in promoting competition was a significant consideration in the enactment of § 222."⁷ The Court found that the evidence "does not adequately show that an opt-out approach would not sufficiently protect customer privacy."⁸ And indeed, there is no evidence that a customer opposed to a carrier's use or disclosure of his or her CPNI outside the customer's existing total service relationship with that carrier would not opt-out from such use and disclosure.

The customer has the final say regarding the use and disclosure of his or her CPNI under both the opt-in and opt-out approach. Neither approach provides the customer with greater or lesser rights than the other, and there is hence no consumer advantage to the opt-in approach. A

⁵ In the *CPNI Order*, the Commission adopted the "total service" approach, which allows a carrier to use and disclose, without the customers' prior approval, the customer's CPNI derived from the complete service(s) to which the customer subscribes from that carrier and its affiliates, for provisioning and marketing purposes within the existing service relationship. *CPNI Order*, 13 F.C.C.R. at 8080, 8083-84, 8087-88, ¶¶ 23-24, 30, 35. The total service approach allows a BOC to share a customer's CPNI with affiliates to whom the customer already subscribes. *Id.*

⁶ *US West v. FCC*, 132 F.3d at 1236.

⁷ *Id.*

⁸ *Id.* at 1239.

notification and opt-out regulatory framework maximizes the customer's knowledge and control over his or her CPNI. The key is for the carrier to provide its customer with (a) full information regarding the consequences of exercising or not exercising his or her option to opt-out and (b) a reasonable opportunity and means to exercise this option if the customer deems it desirable or necessary.

The argument of opt-in advocates that a customer's failure to opt-out may not be construed as constituting informed consent is based on nothing more than speculation and, indeed, is contrary to the regulatory framework established by the Commission. The Commission already has addressed the issue of carrier notification to ensure informed decision-making by consumers. The Commission's existing notification requirement, 47 C.F.R. § 64.2007(f), mandates that each customer receive from the carrier "sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer's CPNI."⁹ As the Commission stated in the *CPNI Second FNPRM*, "[a]mong other things, this rule requires the carrier to advise the customer about the customer's right to limit access to CPNI and the precise steps the customer would need to take to limit such access."¹⁰

The contrary argument of opt-in advocates essentially requires the Commission to assume that its regulations will not be obeyed and enforced. A carrier that complies with the Commission's notification requirement already has taken the requisite steps and borne the consequent costs to put control over CPNI use in its customer's hands. The additional costs and restrictions of onerous opt-in requirements cannot be imposed on such a carrier on the

⁹ 47 C.F.R. § 64.2007(f) (emphasis added).

¹⁰ *CPNI Second FNPRM* at ¶ 7.

unsupported theory that its compliance with the Section 64.2007(f) notification requirement does not serve that requirement's specific purpose to enable the customer to make an informed decision regarding the use of his or her CPNI.

The addition of a Commission requirement that carriers provide customers with reasonable opportunity and means to opt-out would put ultimate control in the hands of individual customers.¹¹ The arguments of opt-in advocates rest on the paternalistic and unsupported assumption that consumers are either too uninformed or too disengaged to act to control the use and disclosure of their CPNI. These arguments ignore consumers' highly individualized preferences regarding the use of their CPNI. Many may prefer allowing carriers to use and disclose their CPNI outside their existing service relationship in exchange for better services or lower costs. If a customer does not take the steps to opt-out from the carrier's use and disclosure of his or her CPNI, that is an indication that he or she does not have a substantial interest in preventing such use and disclosure.¹² Unyielding opt-in requirements may force providers to limit their service offerings and raise their prices, thereby taking this choice away from the customer and depriving him or her of new benefits or even jeopardizing existing services.

Both consumers and carriers bear a high cost from the "belt-and-suspenders" argument that the Commission should impose opt-in requirements so long as there is a possibility that a customer who (a) receives full notification from his or her carrier and (b) does not object to the use or disclosure of his or her CPNI by opting-out, nevertheless actually may oppose such use or

¹¹ Section II of these comments address appropriate methods for assuring reasonable opportunity and means for customers to exercise their opt-out option.

¹² See, e.g., Opinion Research Corporation and Alan F. Westin, "'Freebies' and Privacy: What Net Users Think" (July 1999), www.privacyexchange.org/iss/surveys/sr990714.html.

disclosure. As the Tenth Circuit explained, “[s]uch speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.”¹³ Not even its advocates can claim that opt-in requirements are costless. As the Tenth Circuit stated, such restriction of carriers’ use and disclosure of CPNI “interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services.”¹⁴ The consequent “reduced productivity and higher prices for those products or services”¹⁵ raise an unacceptable risk that the Commission’s opt-in regulations not only would hamper carriers’ growth but also would harm rather than protect consumers’ interests. In sum, there is no concrete evidence of consumer benefits to outweigh the opt-in requirement’s impingement on carriers’ First Amendment rights.

As a general matter, the notification and opt-out approach protects CPNI without unduly restricting carriers’ commercial speech and reducing their productivity (thereby avoiding raising consumers’ costs and limiting their services). Notably, Congress and the FTC have found the notification and opt-out approach appropriate to protect even highly sensitive consumer financial information. The Gramm-Leach-Bliley Act and the FTC’s implementing regulations utilize a notification and opt-out method for obtaining customer consent to financial institutions’ disclosure of personal, nonpublic financial information to unaffiliated third parties for marketing purposes outside of the existing service relationship.¹⁶ The regulations crafted by the FTC – an

¹³ *US West v. FCC*, 182 F.3d at 1239.

¹⁴ *Id.* at 1235 n.7.

¹⁵ *Id.* See also, e.g., Fred H. Cate and Michael E. Staten, “Protecting Privacy in the New Millenium: The Fallacy of ‘Opt-In’” (2001), www.the-dma.org/isec/optin.shtml; Michael A. Turner, “The Impact of Data Restrictions on Consumer Distance Shopping” (2001), www.the-dma.org/isec/9.pdf; Robert W. Hahn, “An Assessment of the Costs of Proposed Online Privacy Legislation” (2001).

¹⁶ Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338 (1998); 15 U.S.C. § 6802(b); 17 CFR Part 160.

agency tasked with the protection of consumers against unfair, deceptive, or fraudulent practices¹⁷ – to ensure proper consumer notification and informed consent to the use of sensitive personal financial information provide a useful model for the Commission’s CPNI rules.¹⁸

III. NOTIFICATION AND CONSENT METHODS

The Commission already has analyzed the proper methods for carriers to provide notification to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer’s CPNI.¹⁹ No further modifications to the Commission’s CPNI rules are necessary to ensure full notification for customers. However, some modifications to the rules may be appropriate to provide a reasonable opportunity for customers to opt-out from carriers’ use and disclosure of their CPNI if they so desire.

Review of the FTC’s rules implementing the Gramm-Leach-Bliley Act is instructive. In addressing the need to provide consumers a reasonable opportunity to opt out, the FTC did not impose detailed requirements but provided a non-exclusive list of examples to serve as guidelines.²⁰ The FTC’s rules state that the consumer has a reasonable opportunity to opt out if, for example, the financial institution provides the customer with an opportunity to opt-out by mailing a form, calling a toll-free telephone number, or any other reasonable means, within 30

¹⁷ See, e.g., 41 U.S.C. § 45; www.ftc.gov/oig/finstate/overview.htm; www.ftc.gov/bcp/bcp.htm.

¹⁸ Adoption of a notice and opt-out approach does not require any modification to the Commission’s total service approach, because the notice and opt-out framework in no way would affect the efficiency benefits to customers from the total service approach

Likewise, Congress’ addition of wireless location information to the definition of CPNI need not change the Commission’s interpretation of Section 222 and its customer approval requirements. Wireless location information and related services are at a gestational stage of development, and insufficient evidence exists to support their detailed regulation. The treatment of wireless location information, with its unique characteristics and concerns, is addressed more appropriately in the Commission’s separate proceeding devoted to that question. See *Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. Mar. 16, 2001).

¹⁹ *CPNI Order*, 13 F.C.C.R. at 8159-65, ¶¶ 132-42.

²⁰ See 16 C.F.R. § 313.10(a)(3).

days from the date the financial institution sends its notice.²¹ The Commission similarly should find that a customer has a reasonable opportunity to opt-out if the carrier provides the customer with an opportunity to opt-out by reasonable means within 30 days from the date the carrier provides the customer with the requisite notification under 47 C.F.R. § 64.2007(f).

In another example, the FTC's rules state that the consumer has a reasonable opportunity to opt out if, for an individual transaction, the financial institution provides notice "at the time of the transaction and request[s] that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction."²² The Commission likewise should allow a carrier to provide the requisite notification at the time of an individual transaction and request that the consumer decide whether to opt out as a requisite to completing that transaction. Under this scenario, the carrier would be entitled to use and disclose the customer's CPNI immediately if the customer does not opt-out but elects to proceed with the transaction. That action by the customer in and of itself provides actual proof of the customer's informed decision to consent to such use.

Nextel agrees with the Commission that, to add a further layer of protection, the customer should retain the ability to opt-out after the date on which consent has been provided or inferred.²³ In the event that the customer does opt out at such later date, the Commission should allow the carrier 30 days from the date of receipt of the customer's opt-out to implement that opt-out request on a going-forward basis. Adoption of these mechanisms for customer notification and consent will ensure a reasonable opt-out opportunity for any customer that does not wish carriers to use or disclose his or her CPNI, while allowing the efficient use of CPNI

²¹ *Id.*

²² 16 C.F.R. § 313.10(a)(3).

²³ *CPNI Second FNPRM* at ¶ 23.

from other customers who prefer allowing carriers to use and disclose their CPNI in exchange for better services or lower costs.

IV. INTERPLAY OF SECTIONS 222 AND 272

The *CPNI Second FNPRM* also sought comment on the interplay between Section 222 and Section 272, which provides that BOCs may not discriminate between their Section 272 affiliates and other entities in their provision of information.²⁴ While competition was not a primary consideration in the enactment of Section 222,²⁵ there can be no dispute that Section 272 was born out of Congress' substantial interest in preventing the BOCs from using their large subscriber base and resources, garnered from their historical monopoly, to maintain and extend their market dominance.²⁶ Allowing BOCs to share CPNI with their affiliates through an opt-out mechanism for the purpose of marketing new services, while requiring that the customer submit an affirmative written request before such information may be disclosed to the BOCs' competitors, would create unacceptable competitive asymmetry. Consequently, the non-discrimination mandate of Section 272 necessitates a requirement that a BOC's affiliates follow the same procedures as their competitors in obtaining CPNI from the BOC for the purpose of marketing new services.

In the *CPNI Order*, the Commission recognized that "section 272 is intended to ensure that BOCs do not give their affiliates a competitive advantage."²⁷ The Commission therefore explained as follows:

²⁴ *Id.* at ¶¶ 1, 25-26.

²⁵ *US West v. FCC*, 132 F.3d at 1236.

²⁶ See *Implementation of the Telecommunications Act of 1996: Accounting Safeguards of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 17539, ¶¶ 2-3 (1996) ("*Non-Accounting Safeguards Order I*").

²⁷ *CPNI Order*, 13 F.C.C.R. at 8179, ¶ 168.

The section 272(c)(1) requirement that “information” or “services” be shared only on nondiscriminatory terms would, we believe, mean that BOCs could share CPNI among their affiliates only pursuant to express approval. . . .

In addition, the application of section 272 to CPNI sharing would seem to require that, when BOCs seek customer approval to share with their statutory affiliates (in the context of either inbound or outbound marketing), they must simultaneously solicit approval for CPNI sharing on behalf of all other carriers that ask them to do so.²⁸

Nevertheless, in attempting to reconcile Section 272 with Section 222, the Commission overruled its prior holding in the *Non-Accounting Safeguards Order I* and interpreted Section 272 not to impose any additional requirements on BOCs’ sharing of CPNI with their affiliates.²⁹

The Commission reasoned that applying Section 272 to preclude BOCs from sharing CPNI with their affiliates under the total service approach of Section 222(c) would undermine the customer convenience policies of the latter provision.³⁰ The Commission explained that BOCs’ “CPNI sharing among affiliated entities to whom the customer already subscribes is unlikely to have anti-competitive effects since any such sharing does not allow carriers to target new customers.”³¹ Under this approach, a BOC could share its large store of CPNI with, for example, an affiliate that is providing CMRS services to the same customers, notwithstanding the significant competitive disadvantage that such information sharing places on competing CMRS providers. The justification for such discrimination between the BOC affiliate and its competitors is the convenience to the customer from the BOC’s and its affiliate’s joint tailoring

²⁸ *Id.* at 8174, ¶¶ 158, 159.

²⁹ *Id.* at 8179, ¶ 169.

³⁰ *Id.* at 8175-77, ¶¶ 161-64.

³¹ *Id.* at 8177, ¶ 164.

and administration of services to which the customer already subscribes, as contemplated by the Commission's interpretation of Section 222(c).³²

Conversely, the Commission believed that “the three specific mechanisms in section 222 that address competitive concerns implicated by a BOC's use of CPNI render the application of section 272's nondiscrimination requirement not essential.”³³ First, the BOCs could not share CPNI with their affiliates to market offerings outside the customer's existing service relationship without obtaining the customer's opt-in consent.³⁴ Second, Section 222(c)(3) allows competitors to the BOCs and their affiliates to obtain aggregate customer information from them.³⁵ Third, Section 222(c)(2) allows competitors to obtain a customer's CPNI if the customer submits an affirmative written request to the BOCs and their affiliates for such disclosure.³⁶ The Commission essentially reasoned that the disparity in burden between a BOC obtaining affirmative opt-in consent from its customer as compared to a competitor obtaining an affirmative written request from the customer was sufficiently limited to avoid triggering the nondiscrimination concerns of Section 272.

As the Commission recognized in the *CPNI Second FNPRM*, however, the foregoing reasoning would not apply under an opt-out approach to BOCs' sharing of CPNI with their affiliates.³⁷ On the benefits side of the scale, the consumer convenience identified by the *CPNI Order* from the BOCs' sharing of CPNI with their affiliates to tailor and administer services to which consumers already subscribe do not justify the BOCs' sharing of CPNI for their affiliates

³² *Id.* at 8175-77, ¶¶ 161-64.

³³ *Id.* at 8177, ¶ 164.

³⁴ *Id.*; see also *id.* at 8178, ¶ 167.

³⁵ *Id.* at 8178, ¶ 165.

³⁶ *Id.*

³⁷ *CPNI Second FNPRM* at ¶ 25-26.

to market new services. On the harms side of the scale, such information sharing would enable the BOCs to provide an exclusive advantage to their affiliates, to the detriment of competition and hence of consumers. The convenience of the opt-out mechanism for the BOC and its affiliate stands in sharp contrast to the Section 222(c)(2) requirement that the customer submit an affirmative written request to the BOC or its affiliate before such information may be disclosed to their competitors. For example, a BOC could share a customer's CPNI with an affiliate who has no existing relationship with that customer, in order for the affiliate to market its CMRS services, so long as the customer has not opted-out from such sharing of CPNI. In contrast, a CMRS competitor would have to market its services independently to the customer and persuade the customer to submit to the BOC an affirmative written request before the BOC would disclose the same CPNI.

Given the BOCs' large customer base and store of CPNI, the resulting competitive disparity between the BOCs' affiliates and their competitors would implicate directly the purpose of Section 272 "to ensure that BOCs do not give their affiliates a competitive advantage."³⁸ Only the Commission's application of the non-discrimination mandate of Section 272 to BOCs' sharing of CPNI outside the total service relationship can eliminate this competitive disparity and serve the purpose of Section 272 to prevent the BOCs' use of their historic and continuing market power to exclusively advantage their affiliates. Nextel recognizes the Commission's concern that requiring BOCs to solicit customer consent for CPNI sharing on behalf of all carriers that ask them to do so may be a cumbersome remedy.³⁹ At a minimum, however, the Commission should satisfy the Section 272 non-discrimination mandate by prohibiting BOCs

³⁸ *CPNI Order*, 13 F.C.C.R. at 8179, ¶ 168.

³⁹ *Id.* at 8177, ¶ 163.

from sharing CPNI with any Section 272 affiliate, outside of the total service relationship, unless the affiliate obtains affirmative written consent from the customer in the same manner as unaffiliated entities under Section 222(c).

V. CONCLUSION

For the foregoing reasons, Nextel supports the Commission's adoption of a notice and opt-out approach to ensure customers' informed consent to carriers' use and disclosure of CPNI. As part of such a notice and opt-out regulatory framework, Nextel supports the Commission's application of the Section 272 non-discrimination requirement to the BOCs' sharing of CPNI outside the "total service" context.

Respectfully submitted,

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